STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL GAJDA,

Defendant-Appellant.

UNPUBLISHED
September 20, 2002

No. 233168
Lapeer Circuit Court
LC No. 00-006951

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arose from the shooting death of David Porter. The evidence adduced at trial showed that on December 16, 1999, defendant had a conversation with his former fiancé, Tara Cascaddan, who was Porter's girlfriend. Cascaddan told defendant that she believed that Porter was planning to propose marriage to her, and defendant told her that he would never allow her to marry Porter. Numerous e-mail messages from defendant to Cascaddan demonstrated defendant's continuing devotion to Cascaddan, including one e-mail in which defendant stated that he would kill anyone who hurt Cascaddan. Later that same evening, defendant called Cascaddan from the road and told her that he was having problems with his truck, and he asked her to send Porter with a wrecker to get him. Later, Porter was reported missing. Police stopped defendant in his vehicle and asked him about Porter. Defendant admitted that he called for Porter, but he stated that he saw Porter drive past him on the road and that Porter never stopped. The officers noticed blood on defendant's jacket. Sergeant Dave Eady asked defendant if they could take the jacket until they could ascertain Porter's whereabouts, and defendant agreed. Ultimately, Porter was found by the side of the road in a ditch. He had been shot in the head. Later, in a statement to police, defendant admitted that he shot Porter, but he claimed that his gun discharged accidentally.

Defendant argues that the trial court abused its discretion by not allowing expert witness testimony about the inner workings of guns. We disagree. The determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999), citing *People v*

Beckley, 434 Mich 691, 711; 456 NW2d 391 (1990). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made. *Murray*, *supra*. A trial court's decision on a close evidentiary decision does not amount to an abuse of discretion. *People v Katt*, 248 Mich App 282, 289; 639 NW2d 815 (2001), citing *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Expert witness testimony is admissible if the court determines it will assist the jury to understand the evidence or determine a fact at issue. MRE 702. However, a witness must first be qualified as an expert by knowledge, skill, experience, training, or education. *Id*. To qualify as an expert, "the expert must be an expert in the precise problem as to which he undertakes to testify." *Beckley*, *supra* at 726 (citation omitted).

In this case, the witness stated that she is an NRA certified instructor in rifle, pistol, shotgun, and home firearms responsibility. She teaches classes on the safe handling of firearms, and she teaches "some of the mechanics of the gun." However, the witness admitted that her training as a competitive markswoman is not equivalent to being a gunsmith. She also admitted that a significant portion of the analysis related to defendant's allegation that the gun fired accidentally involved knowledge of the inner workings of the trigger and she was not qualified to work on a gun trigger. The trial court qualified the witness to give expert testimony regarding marksmanship and the safe use of a handgun, but concluded that the nature and extent of the witness' knowledge was not sufficient to render an expert opinion on the inner workings of guns. On the basis of the witness' voir dire testimony, we find no abuse of discretion in the trial court's exclusion of this evidence.

Defendant next argues that he was denied a fair trial because the trial court improperly urged the jury to experiment with the gun used in the shooting, and during deliberations, the jury requested and was provided with the gun. Defendant did not object to the jury instructions or to the jury's request for the gun. Therefore, defendant failed to preserve the issue for appeal and we review the issue for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001), citing *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999).

Contrary to defendant's argument, the trial court's instructions did not encourage the jury to conduct experiments, nor is there any evidence on the record that any experimentation occurred. The court merely told the jurors that they could examine the properly admitted evidence. We find no error.

Defendant argues that he was prejudiced when he was not allowed to be present when the jury viewed a demonstration of his truck being loaded onto the wrecker. Because defendant did not object to the procedure, this issue is not preserved and we review for plain error affecting defendant's substantial rights. *Carines*, *supra* at 766-767.

A defendant has the right to be present at trial, MCL 768.3, which includes a jury viewing of evidence. *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987), citing *People v Mallory*, 421 Mich 229, 244-248; 365 NW2d 673 (1984). However, it is possible that a defendant's absence made no difference in the result of the trial. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977). The test for determining whether a defendant's absence from

part of a criminal trial resulted in error requiring reversal is whether there is any reasonable probability of prejudice. *People v Kvam*, 160 Mich App 189, 197; 408 NW2d 71 (1987).

In this case, a demonstration of defendant's truck being loaded onto the flatbed of the wrecker was conducted so the jury could see the positioning of the truck on the wrecker. The prosecutor, defense counsel, the jury, and two journalists were present at the viewing. See *Morgan*, *supra* at 536-537. There was no discussion or questions during the viewing. Defense counsel agreed that it was important for the jury to see the wrecker and the truck. Defendant did not request to be present at the viewing. Importantly, in addition to the presence of defense counsel, a videotape was made of the viewing for the record. Given these circumstances, we find no error and conclude that the trial court properly conducted the jury viewing.

Defendant contends that the trial court erred in denying his motion for a directed verdict on the first-degree murder charge. We disagree. This Court reviews a trial court's decision to grant or deny a motion for directed verdict de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). The critical question in deciding a directed verdict motion under MCR 6.419(A) is whether there was sufficient evidence from which a rational trier of fact could find the elements of the crimes proven beyond a reasonable doubt. *People v Dalessandro*, 165 Mich App 569, 583; 419 NW2d 609 (1988). The evidence is viewed in the light most favorable to the prosecution. *People v Swartz*, 171 Mich App 364, 378; 429 NW2d 905 (1988).

First-degree murder is the intentional killing of another, done with premeditation and deliberation. See MCL 750.316(1)(a). Premeditation and deliberation can be inferred from the circumstances of a murder, including the defendant's behavior before and after the crime, and the previous relationship between the defendant and the victim. *Kvam*, *supra* at 193.

Defendant's numerous e-mails to Cascaddan indicated that defendant was still in love with her. In one of the e-mails, defendant threatened to kill anyone who hurt Cascaddan. On the evening of the shooting, Cascaddan told defendant that she believed Porter planned to ask her to marry him, and defendant told her, "That's one man I'll never let you marry." Later that same evening, defendant claimed his truck was not working properly and he called her to have Porter come with a wrecker to help him. Although defendant maintained that Porter was shot when his gun accidentally discharged, the characteristics of Porter's injury indicated that the muzzle of the gun was less than twelve inches from Porter's head when he was shot. Defendant dragged Porter into a ditch and left him there, even after he saw Porter move. Additionally, although defendant's truck was allegedly malfunctioning such that he needed a tow, he was able to drive it home after the shooting. When viewed in the light most favorable to the prosecution, the evidence supported a finding of premeditation and deliberation. Thus, there was sufficient evidence to support the charge of first-degree murder, and the trial court properly denied defendant's motion for directed verdict.

Defendant next argues that the prosecutor made a civic duty argument and appealed to the jury's sympathy during closing argument. We disagree. Defendant's claims of prosecutorial misconduct are not preserved because defendant failed to object at trial. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). We review these instances of alleged misconduct for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *Carines*, *supra* at 761-762. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411

(2001). Appeals to the jury to sympathize with the victim constitute improper argument. *Id.* at 591. A prosecutor's remarks are reviewed in context, on a case-by-case basis. *Id.* No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.*; *Schutte*, *supra* at 721.

Defendant cites the prosecution's mere mention of the word "firemen" and the community's loss in the context of discussing the effects of defendant's actions. Defendant also claims that the prosecutor appealed to the jury's sympathy for the victim. Neither of the challenged remarks of the prosecution require reversal. The prosecutor was commenting on the e-mail evidence when he asked the jury to avoid the temptation to sympathize with defendant and to remember the victim. See *Schutte*, *supra* at 721. Although the prosecutor reminded the jury of the loss suffered by the victim and his family and friends, the prosecutor did not ask the jury to suspend its judgment and decide the case on the basis of sympathy. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Indeed, immediately after he made the challenged remarks, the prosecutor argued the evidence and asked the jury to convict defendant "[n]ot as a favor to me or anyone else but [ ] based on the evidence and the facts that have been presented in this case." *Id.* at 21-22. Further, the trial court instructed the jury that it "must not let sympathy or prejudice influence [its] decision" and that the statements and arguments of counsel are not evidence. Defendant has not shown plain error affecting his substantial rights. *Carines*, *supra*.

Lastly, defendant argues that the stop of defendant was not based on reasonable suspicion and that his consent to the seizure of his jacket was not voluntary. We disagree. "This Court's review of a lower court's factual findings in a suppression hearing is limited to clear error and those findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made." *People v Lewis*, 251 Mich App 58, 67; 649 NW2d 792 (2002). We review de novo the lower court's ultimate ruling on a motion to suppress. *Id.* at 67-68. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001).

To justify stopping a car for an investigative stop, a police officer must have reasonable suspicion, based on specific and articulable facts, along with rational inferences from those facts, that the person stopped has been engaged in some type of criminal activity. *Terry v Ohio*, 392 US 1, 21; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). Police conduct is evaluated objectively and in light of the totality of the circumstances. *Terry*, *supra* at 22; *Oliver*, *supra*. The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). See *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). The defendant's knowledge of the right to refuse consent is one factor to consider but is not necessarily a prerequisite for consent to be valid. *Borchard-Ruhland*, *supra*. "The presence of coercion or duress normally militates against a finding of voluntariness." *Id.*.

The trial court found that the initial stop was based on information that Porter was missing, that there was a relationship between defendant, Porter, and Cascaddan, and that defendant was the last known person to have had contact with Porter. The court found no coercion or intimidation of defendant, and found that the conversation between the police and defendant was "friendly and business-like." The court relied on defendant's testimony that the officer's demeanor was "concerned" at the beginning of the conversation and "calm" at the end

of the conversation, and found that "concern and calm certainly don't show intimidation, coercion or threats in any way, shape or form." The court also found the testimony of the officers to be more credible than defendant's testimony in light of the fact that defendant admitted that he lied to the police. The court was satisfied that the officers did not coerce or threaten defendant in any way, and that his consent to the seizure of his jacket was freely given.

After reviewing the record, we conclude that the trial court's findings were not clearly erroneous. The officers testified that they stopped defendant's van as it passed by them in order to question him about Porter, who had been reported missing. They were familiar with the relationship among defendant, Porter, and Cascaddan. They also believed that defendant had seen Porter that night. The officers testified that they did not threaten or try to coerce him in any way. The officers allowed defendant to drive to his home and they allowed him to go into his home alone in order to get another coat. At no time was he in custody. We conclude that the police officers had reasonable suspicion of criminal activity to justify stopping defendant, and that defendant voluntarily consented to the seizure of his jacket.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder